IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 705 of 2005
In
SPECIAL CIVIL APPLICATION No. 2205 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE B.J.SHETHNA
HONOURABLE MR.JUSTICE M.C.PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BALRAM GANPAT MAHAMUNKAR - Appellant(s)

Versus

DY. POLICE COMMISSIONER & 3 - Respondent(s)

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Appearance :
MR PA JADEJA for Appellant(s) : 1,
MS PB SHETH Ld. AGP for Respondent(s) : 1 - 4.
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CORAM : HONOURABLE MR.JUSTICE B.J.SHETHNA
and
HONOURABLE MR.JUSTICE M.C.PATEL

Date : 15/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE B.J.SHETHNA)

1. Admit. Learned AGP, Ms.Sheth, waives the service.

2. As per the earlier order dated 13.7.2005 passed by another Division Bench of this Court, learned AGP, Ms.Sheth, has produced the entire file of the appellant – petitioner which includes rewards / awards as well as punishment inflicted on the appellant during his service career between 8.12.1953 and 24.4.1985. We have carefully gone through the same and as requested by learned Counsel for the parties, this appeal is disposed of by this judgment today.

3. The appellant – petitioner Shri Balram M. Mahamunkar from Maharashtra had joined the services as Police Constable way back on 8.12.1953 as soon as he completed age of 18 years, as he was born on 19.12.1935. He was promoted first as Second Grade Head Constable in 1978 and later on, further promoted to the post of First Grade Head Constable in 1980. As per his case in the writ petition, during the service for more than 28 years, he was awarded 16 rewards and awards for his excellent performance.

3.1 However, it is the case of the Department that on 4.1.1981 at about 9.15 p.m. in the night hours, he was found drunk behind police canteen when wrestling program

was going on. He was arrested for the offences under Sections 66(1)(b) and 85 (1)(3) of the Bombay Prohibition Act and immediately on that very day i.e. on 4.1.1981, placed under suspension. Simultaneously, Criminal Case No.4002 of 1981 was filed against him in the Court of learned JMFC,Surat. The prosecution had examined panch witness Chhabildas Jaikishandas, Police Head Constable Parshottambhai Bhogilal, Amrat Chhotalal and retired PSI Shri Pandurang Shyamrao Jaggannath. Panch witness turned hostile and the remaining police witnesses not supported the prosecution case. Sufficient opportunities and time were given to the prosecution to examine important witnesses like doctor, who had examined the delinquent – accused and the Chemical Analyzer. But, the prosecution failed to examine them. Considering all these, the learned JMFC,Surat by his order dated 30.1.1982 acquitted the accused for the offences under Sections 66(1)(b) and 85(1)(3) of the Bombay Prohibition Act in absence of any evidence.

4. On the production of the certified copy of the judgment and order of acquittal dated 30.1.1982 by the accused before the Deputy Police Commissioner, Surat City, Surat, the Deputy Police Commissioner by his order

dated 8.2.1982 (Annexure-B) reinstated the petitioner in service and his period of suspension to be decided at the end of departmental inquiry. Accordingly, on the very next day i.e. on 9.2.1982, the appellant – delinquent joined the service. Thereafter, after a period of almost 1 and ½ years i.e. on 13.7.1983, for the first time, show cause notice was issued to the appellant – delinquent calling upon him to show cause as to why the disciplinary proceedings may not be initiated against him for the charges levelled against him in the charge-sheet, which was replied on 1.8.1983 by the delinquent, wherein several objections were raised by him including the maintainability of the departmental inquiry after he was acquitted by the competent Criminal Court in absence of any evidence whatsoever produced by the prosecution. However, his reply was not accepted and the departmental inquiry was held, wherein for the first time, doctor and chemical analyzer have been examined, who were not examined before the competent Criminal Court in a Criminal Case filed against the delinquent – accused. After considering their evidence and the evidence of other witnesses, the Inquiry Officer came to the conclusion that the charge was proved against him. Relying on the said report, the Deputy Police

Commissioner, Surat City, Surat, by his order dated 24.10.1985 (Annexure-C) dismissed the appellant – delinquent from service. Against which, he filed an appeal before the Police Commissioner which was also dismissed on 17.5.1988. His Second Appeal was also dismissed by the DGP and IGP on 24.1.1991. Aggrieved by the same, he has approached this Court by way of Special Civil Application No.2205 of 1991, which was dismissed on 20.1.2005 by the learned Single Judge of this Court. Hence, this appeal.

5. Learned Counsel Shri Jadeja for the appellant – delinquent vehemently submitted that once the delinquent was acquitted by the competent Criminal Court in absence of any evidence whatsoever adduced by the prosecution, then, it was not open to the respondents to hold departmental inquiry against him for the same charges. However, it was submitted by learned AGP, Ms.Sheth, that the delinquent was acquitted by the competent Criminal Court on technical ground and he was not honourably acquitted by the competent Criminal Court. Therefore, it was always open to the respondents to hold the departmental inquiry and if he is found guilty, then, he can be dismissed from service because he was a Police

Head Constable and charge against him was proved for having consumption under Sections 66(1)(b) of the Bombay Prohibition Act.

6. However, from the original record produced before us by learned AGP, Ms.Sheth, we find from the panchnama that the appellant – delinquent was not on duty as he was in civil dress. Therefore, it clearly appears to us that on the wrong assumption the entire inquiry proceeded against him that he committed misconduct while on duty. Secondly, if the Department could examine Medical Officer, who had examined the appellant – delinquent, after he was immediately produced before him on 4.1.1981 after the so called incident and the Chemical Analyzer,Junagadh in the departmental inquiry, then, we fail to understand that why they were not kept present before the competent Criminal Court for deposing against the delinquent. If they were produced before the competent Criminal Court, then, they would have been cross-examined by the competent and efficient Advocate. We find from the order of acquittal dated 30.1.1982 (Annexure-A) passed by the learned JMFC,Surat in Criminal Case No.4002 of 1981 that though sufficient opportunities were given to the prosecution, they failed to keep important witnesses like

doctor and chemical analyzer present before the Court for the purpose of examination. Thus, in our considered opinion, it was not proper on the part of respondents to examine them for the first time in the departmental inquiry, where the appellant had no opportunity to defend his case through an able lawyer. That apart, it is clear from the evidence of doctor, who is examined in the departmental inquiry, that he had committed breach of mandatory Rule-4 of the Bombay Prohibition (Medical Examination and Blood Test) Rules,1959, while taking blood of the delinquent. It is clear from the impugned order of dismissal (Annexure-C) dated 24.10.1985 filed by the Deputy Police Commissioner, Surat City, Surat that doctor, who had taken the blood sample of the accused, has not at all stated in his evidence that he had taken the phial and syringe sterilized and put up his own seal. He has also not stated in his evidence in the departmental inquiry that while taking the blood sample, he had added anticoagulant and preservative in the phial and rigorously shaken it. The blood sample was required to be sent within 7 days to the Chemical Analyzer but, there is no such evidence coming on the record. However, the Disciplinary Authority has observed in its order that there was no cross-examination on the part of the

delinquent and no clarification was sought for. In fact, the law on this point is very well settled. It is the duty of the prosecution or the Department to lead the specific evidence and if such an evidence has not come in the chief-examination of the doctor, then, there was no need for the delinquent to cross-examine or seek clarification on that point. From the impugned order of dismissal itself, it is clear that except the police witnesses, no other independent witness was examined and even both the police inspectors Shri Parmar and Shri Jayram have clearly stated in their evidence that when the accused was arrested by them on the day of incident, he was not misbehaving in public. Thus, offence under Section 85(1)(3) of the Bombay Prohibition Act was not established. If that is so, then, when on the same point if the competent Criminal Court had acquitted the delinquent, then, in our considered opinion, it was not proper on the part of disciplinary authority to take a different view in the matter and dismissed the appellant from service.

7. Once we come to the conclusion that the impugned order of dismissal passed by the Disciplinary Authority is bad in law and illegal, then, all the subsequent

orders passed by the appellate authorities in appeals are also required to be quashed and set aside.

8. Ordinarily, when the order of dismissal is set aside, then, the person is to be reinstated in service with back-wages. But, in the instant case, now, there is no question of reinstatement of the appellant in service as he had already reached the age of superannuation on 3.12.1990 and learned Counsel Mr.Jadeja left it to the Court on the point of back-wages. Therefore, applying the principle of “no work, no pay”, we do not award any back-wages while setting aside the impugned order of dismissal.

9. In view of the above discussion, this appeal is allowed and the writ petition filed by the appellant – petitioner is accepted by setting aside the judgment and order passed by the learned Single Judge dismissing the writ petition of the appellant – petitioner, and the impugned order of dismissal at (Annexure-C) and further orders passed by the Authorities in appeals. Once we have quashed and set aside the impugned order of dismissal from service, then, except the order of back-wages, the appellant would be entitled for all other consequential

benefits of service as if he was not dismissed from service by an order dated 25.10.1985 (Annexure-C) treating him as superannuated on 31.12.1990. He shall also be entitled for all the pensionary benefits of service. However, there shall be no order as to costs. Direct service is permitted.

(B.J.SHETHNA,J.)

(M.C.PATEL,J.)

(vipul)